United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

77-7109

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No. 77-7109

In the
United States Court of Appeals
For the Second Circuit

DAVID BECKER and MARGARET B. LEDDER, Plaintiffs-Appellants, vs. SCHENLEY INDUSTRIES, INC., GLEN ALDEN CORPORATION and RAPID AMERICAN CORPORATION, Defendants-Appellees.	Appeal from the United States District Court for the Southern District of New York. Honorable Constance Baker Motley, Judge Presiding.

PETITION OF PLAINTIFFS-APPELLANTS FOR
REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Reasons For Rehearing In Banc

I. The opinion of the Court unconstitutionally deprives hundreds of investors of access to a federal court for adjudication of their federal claims. Since Congress has granted federal courts exclusive jurisdiction of these claims, the result of the Court's opinion is that these hundreds of investors are barred from seeking relief in any court.

II. The opinion of the Court is in conflict with the settled law of this Circuit, as well as of the United States Supreme Court,

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defining the nature of a "claim for relief" under the Federal Rules of Civil Procedure. In the light of this settled law, the Court's conclusion that designation of this case as a class action would result in maintenance of duplicative class actions was clearly erroneous.

ARGUMENT

I. THE COURT'S OPINION BARS HUNDREDS OF INVESTORS FROM ACCESS TO ANY FEDERAL COURT FOR ADJUDICATION OF THEIR FEDERAL CLAIMS.

Plaintiffs brought this action on behalf of a class of of persons consisting of all minority stockholders of BHM Industries, Inc. at the time of the merger of that corporation into defendant Schenley Industries, Inc. in December, 1969.*/

Plaintiffs initially sought class action certification on July 18, 1972. Certification was conditionally denied on October 15, 1972, solely on the ground that plaintiffs had not shown a substantial possibility that they would prevail on the merits (A. 164).**/

At the time plaintiffs sought class action certification there was then pending in the Southern District of New York five consolidated cases under the caption Cole, et al. v. Schenley Industries, Inc., et al., 71 Civ. 1028, etc. These cases, brought by shareholders of Schenley, challenged the merger of Schenley into a wholly owned subsidiary of Glen Alden in June of 1971. On May 25, 1973, Judge Weinfeld certified two classes in Cole which he defined as follows:

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*/ At the time of the merger BHM had 5,796,900 shares of common stock outstanding. Defendant Schenley was the owner of 3,054,450 shares (approximately 52.7%); the minority shareholders sought to be represented by plaintiff owned the balance. (A. 14)

**/ In conditionally denying certification, the District Court relied on Dolgow v. Anderson, 43 FRD 472 (E.D.N.Y. 1966). Dolgow was disapproved by the United States Supreme Court in Eisen v. Carlisle, Jacquelin, 417 U.S. 156 (1974).

> "Class I will be deemed to be limited (as is Class II) to holders of Schenley as of February 24, 1971 -- the only difference between Classes I and II being that the members of Class II continued to hold their shares until the effective date of the merger while the members of Class I elected to sell their shares prior to that date." (A. 732).

Approximately two-thirds of the class members in Cole were later found by the trial judge in that case to consist of persons who held $1.40 Schenley preferred stock which had been issued in the 1969 BHM-Schenley merger. The $1.40 Schenley preferred stock was traded on the New York Stock Exchange up to the date of the Schenley-Glen Alden merger (A.486). From January, 1970 through February, 1971, the trading volume of Schenley $1.40 preferred exceeded 1,200,000 shares. (A. 397) There was no finding by the trial judge that those persons who held Schenley preferred stock at the time of the Schenley-Glen Alden merger were identical to those persons who had originally received the Schenley preferred in the BHM-Schenley merger 14 months earlier. Indeed, in view of the heavy trading volume in Schenley preferred, the clear inference is that a great many of the members of the Cole class were not former BHM minority stockholders.

The plaintiffs in Cole never attempted to represent anyone other than holders of Schenley stock as of February 24, 1971, nor did they ever attempt to assert any claim on behalf of anyone other that holders of Schenley stock.

The Court's opinion in the present case affirmed the District Court's denial of class action certification on the ground that the claim asserted by plaintiffs was virtually identical to a claim asserted in

Cole, and that maintenance of the present case as a class action would be duplicative of the class action certified in Cole (Slip Op. pp. 4427-4429).

But what the Court overlooked was the impact of its decision on hundreds of investors whose claims are now barred entirely from the federal courts. Since none of the hundreds of former minority shareholders of BHM who sold their Schenley $1.40 preferred prior to February 21, 1971, were represented in Cole, and since plaintiffs here have been prevented from representing them in this case,*/ the result is they are and have been totally unrepresented. They received no notice of the pendency of the Cole case or of the present case, yet, by this Court's decision their claims have been found to have been adjudicated adversely to them -- in their absence -- in the Cole case.

Even worse, if the panel's holding is permitted to stand, these hundreds of investors cannot now obtain adjudication of their claims in any other court. Any attempt by them to now assert a claim based on the 1969 BHM-Schenley merger, either individually or through a class representative, would be met by the bars of the statute of limitations, res judicata or collateral estoppel.**/

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*/ Plaintiffs could properly represent those minority stockholders of BHM who retained as well as those who sold their Schenley stock received in the BHM-Schenley merger. Herbst v. ITT, 495 F.2d, 1308 (2d Cir. 1974).

**/ Since the panel expressly held that "the validity of the 1969 proxy statement was squarely raised by the Cole complaint" (Slip Op. 4429), both res judicata and collateral estoppel would apply to any subsequent action challenging that proxy statement.

Accordingly, these investors, who have never been represented in any action, are now barred from seeking adjudication of their federal claims in a federal court despite the fact that plaintiffs have been attempting to represent them since December, 1971. Nor can these investors seek relief in a state court since Congress has granted to the federal courts exclusive jurisdiction of their federal claims. 15 USC § 78aa.

In sum, in its desire to avoid what it perceived to be duplicative class actions, this Court has preferred principles of judicial economy to concern for due process of law.*/ See Greenfield v. Villager Industries, Inc., 483 F.2d 824, 833 (3d Cir. 1973).

II. IN DECIDING THAT PLAINTIFFS' CLAIM WAS INCLUDED IN THE COLE ACTION THE COURT OVERLOOKED OR MISAPPREHENDED CONTROLLING PRECEDENTS OF THIS CIRCUIT, AS WELL AS OF THE UNITED STATES SUPREME COURT, DETERMINING WHAT CONSTITUTES A CLAIM FOR RELIEF UNDER THE FEDERAL RULES OF CIVIL PROCEDURE.

The Court's affirmance of the District Court's order denying class action certification was grounded on its finding that the claim of plaintiffs in the present case challenging the 1969 BHM-Schenley merger was "virtually identical" to a claim asserted in the Cole action, and that plaintiffs, as Schenley stockholders, were members of the Cole class. The Court therefore concluded that maintenance of the present case as a class action would have been duplicative of the class action in Cole and, in the interest of

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*/ While it is true that payment in full of their individual damages has been tendered to plaintiffs in an effort to moot their claims, plaintiffs are not free to accept this payment and abandon all of the other members of their class. Plaintiffs were and continue to be fiduciaries for their class and are obliged to continue to represent them; they are not free to accept a private pay-off. Greenfield v. Villager Industries, 483 F.2d 824, 832 (3d Cir. 1973).

judicial economy, should not be permitted. The finding that the claim in the present case was identical to one asserted in Cole is reiterated throughout the opinion, and is fulcrum of the decision. */

A. This Court Has Misapprehended The Nature Of The Claims For Relief In This Case And In Cole.

The Court made no analysis of the pleadings in Cole, except to refer to the trial court's finding that "paragraphs 22(b) and 32(b) of the amended complaint in Cole make clear that, as here, the BHM-Schenley merger and proxy statement are in issue in Cole." (Slip op. 4428). As did the trial court, the panel failed to read these paragraphs in the context of the entire complaint, particularly with respect to the transaction in question and the relief sought in Cole. If it had done so, its conclusion would undoubtedly have been the same as that of Judge Owen, who actually tried the case:

> "This is an action brought on behalf of former shareholders of Schenley Industries, Inc. ('Schenley') with respect to the merger of June 17, 1971 whereby Schenley became a wholly owned subsidary of Glen Alden Corporation ('Glen Alden'). The main attack of the plaintiffs is upon the proxy statement of May 21, 1971, issued in connection with the upcoming merger, which is alleged to have been materially false and misleading.
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> The plaintiffs' case basically is founded upon a single fact nucleus, to wit, that Schenley possessed large amounts of what plaintiffs would

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*/ The Court also found that, at the trial in the Cole case, "a number of exhibits and substantial testimony were introduced with respect to the 1969 transaction." (Slip Op. 4429). This finding by the Court is puzzling since the trial record in Cole was not made a part of the record in the present case; nor was the panel asked to take judicial notice thereof.

> define and would require management to define as 'surplus' or 'excess' cash; that this 'information' (or 'definition') was of importance to the shareholders and that the proxy statement failed to make adequate disclosure about such 'excess' cash.
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> * * *
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> What plaintiffs' claim comes down to in the final analysis is whether or not Schenley was required to characterize certain facts in a particular way, notwithstanding that they were otherwise essentially disclosed in the [June 17, 1971] proxy statement." (A. 486).

Paragraphs 22(b) and 32(b) of the Cole complaint alleged that the Schenley proxy statement in connection with the 1969 BHM-Schenley merger was misleading, in order to charge that, in the past, Schenley had depressed the market price of its securities. (A. 321). However, the Cole complaint also admitted that, by the time of the 1971 proxy statement the facts allegedly concealed from Schenley stockholders in 1969 had become publicly known. (A. 323). Indeed, Judge Owen so found, after the trial in Cole, when he said:

> "There is no question that Schenley was a 'cash rich company' at the time of the proxy statement. The facts about its cash position and the sources of the growth of Schenley's cash were adequately disclosed and are not in dispute. What is in dispute is (1) whether or not the proxy statement wrongfully failed to compare Schenley's cash position on May 31, 1971 with its cash position exactly three years earlier; (2) whether the proxy statement wrongfully failed to disclose the extent of the proposed use of Schenley's cash upon consummation of the merger, and (3) whether the proxy statement wrongfully failed to state that Schenley had approximately $140,000,000 in 'excess cash.'
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> * * *

> While there was a dispute arising on the trial as to whether Schenley's cash position at the time of the proxy statement was $162,000,000, as contended by plaintiffs, the sources in the improvement in the company's cash position was (sic) fully revealed. These sources were the sale of Buckingham, an increase in net worth resulting from operating earnings after the payment of dividends, certain cash held by Buckingham prior to the time it became a wholly owned subsidiary of Schenley's and the reduction of inventory." (A. 486-7) (Emphasis supplied)

In short, plaintiffs in Cole did not, and could not have asserted a claim based on the fraudulent 1969 proxy statement, since the facts allegedly concealed therein were admittedly known to the Cole plaintiffs when they received the 1971 proxy statement, and brought suit thereon. Nor did they allege that they or their class of Schenley stockholders were damaged in any way by the 1969 BHM proxy statement and that they were entitled to any relief therefrom. Indeed they could not have, since their claim was limited to a violation of their rights as Schenley stockholders in February, 1971, not as BHM stockholders in November, 1969.

By contrast, plaintiffs' claim in the present case is limited to the 1969 BHM-Schenley merger, challenges only the BHM proxy statement issued in connection therewith and is brought on behalf of a class consisting exclusively of BHM minority stockholders at that time. The relief sought is for damages suffered by them arising out of the violation of their federal rights in connection with that transaction.

B. This Court Has Misapprehended Or Overlooked The Controlling Precedents Governing Definition Of A "Claim For Relief."

Merely because plaintiffs in Cole have made allegations about the

1969 proxy statement does not mean that they have asserted a claim for relief with respect thereto. A claim for relief does not consist of facts but of the unlawful violation of a right which the facts show, American Fire & Casualty Co. v. Finn, 346 U.S. 6, 13 (1951). As Judge Swan of this Circuit has said: a claim consists of "the aggregate of operative facts which give rise to a right enforceable in the courts." A series of wrongful acts, all aimed at a single wrongful result, constitute but one claim. Original Ballet Russe, Ltd. v. Ballet Theatre, Inc., 133 F.2d 187, 189 (2d Cir. 1943). Where the plaintiff has suffered a single wrongful invasion of a single primary right, he has but a single claim regardless of whether the acts constituting such invasion were one or many, simple or complex. American Fire & Casualty Co., supra, at 13.

Thus, whatever facts the Cole plaintiffs may have alleged with respect to the 1969 Schenley proxy statement, it is clear that they asserted but one claim: the unlawful violation of their federal rights as Schenley stockholders in connection with the 1971 Schenley-Glen Alden merger. It is likewise clear that plaintiffs in the present case asserted a separate and distinct claim: the violation of their federal rights as BHM minority stockholders in connection with the 1969 BHM-Schenley merger.

Similarly, when measured under Rule 54(b) criteria, the separateness of the claims in the two cases is readily apparent. The Cole plaintiffs sought damages for undervaluation of their Schenley stock in the 1971 merger. Plaintiffs in the present case sought

damages for undervaluation of their BHM stock in the 1969 merger. As these were separate and distinct securities in different corporations, recovery of damages in one case could not have been duplicative or mutually exclusive of damages recoverable in the other. Under this standard, the claims asserted in the two cases were separate and not merely the same claim asserted under different legal theories. Reiser v. Baltimore & Ohio R.R., 224 F.2d 198, 199 (2d Cir. 1955); Perma-Research & Development Co. v. Singer Co., 410 F.2d 572 (2d Cir. 1969).

When standards of res judicata or collateral estoppel are applied, the result is no different: the claims in the two cases are separate and distinct. Herendeen v. Champion International Corp., 525 F.2d 130, 133 (2d Cir. 1975); United Shoe Machinery Corp. v. United States, 258 U.S. 451, 459, 462 (1922).

In deciding that the claim in the present case was included in the Cole action, this Court has overlooked or misapprehended the foregoing controlling precedents.

The Court's emphasis on plaintiffs' failure to intervene in Cole is plainly misplaced. Given the facts that the two cases involved distinct and unrelated corporate mergers, separated in time by 18 months, between different corporations, involving separate and unrelated proxy statements, and entirely different classes of stockholders, it is inconceivable that intervention by plaintiffs in Cole could have been superior to a separate class action as a method of resolving the controversy raised by plaintiffs' complaint. The theoretical possibility that some judicial economy might have resulted from intervention would hardly justify denying plaintiffs the right to prosecute their independent claim and certainly should not

justify the draconian outcome for the hundreds of investors not represented by the Cole plaintiffs. Their day in court will never come.

CONCLUSION

For the foregoing reasons, it is respectfully urged that a rehearing in banc be granted and that the decision of the District Court be reversed.

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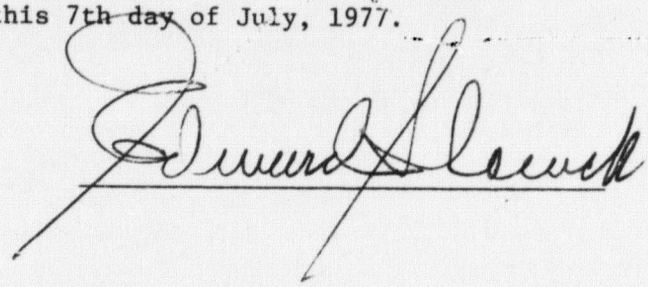
EDWARD SLOVICK hereby certifies that he caused copies of the foregoing Petition of Plaintiffs-Appellants For Rehearing With Suggestion For Rehearing In Banc to be served upon Fried, Frank, Harris, Shriver & Jacobson, 120 Broadway, New York, New York 10005 and Rubin, Baum, Levin, Constant & Friedman, 645 Fifth Avenue, New York, New York, by mailing same properly addressed this 7th day of July, 1977.